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The Warren Court, Idealism, and the 1960s

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Imagine: it is January 20, 1961. John Kennedy has just given his inaugural address. Idealism reigns. Optimism abounds. The world is changing. A new generation is assuming the mantle of leadership. Kennedy would put us on a path to the moon and solve entrenched problems, most notably de jure discrimination against African Americans in much of the country.

The Warren Court was prepared to assist. Warren, Douglas, Black, Clark, and Brennan are in Warren's office. He has a text of the president's speech, and he reads from it: we must "undo the heavy burdens . . . [and] let the oppressed go free."[1]

The justices ask themselves what the Court could do to ease the heavy burdens individuals bear when caught up in the American criminal justice system. There is little doubt that many state systems in the 1950s were fundamentally unfair to

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1. *See* John Fitzgerald Kennedy, *Inaugural Address (20 January 1961)*, VOICES OF DEMOCRACY: THE U.S. ORATORY PROJECT, http://voicesofdemocracy.umd.edu/kennedy-inaugural-address-speech-text (last visited Apr. 4, 2020) (on file with *The University of the Pacific Law Review*).

suspects and defendants, particularly the vast majority who were indigent. Having mustered a unanimous Court for *Brown v. Board of Education*,[2] Warren would undoubtedly have thought he could muster a majority to effect needed changes in state criminal justice systems.

In that imaginary meeting, Chief Justice Warren would look at the state of criminal "justice" in 1961. What would the former prosecutor see? Police in half the states can conduct unreasonable searches and seizures without fear of losing evidence because *Wolf v. Colorado*[3] refused to require states to apply the Fourth Amendment exclusionary rule. Police in all fifty states are free to conduct relentless interrogation and deny requests for counsel, as long as the police stay within the spacious confines of the common law voluntariness norm.[4] Fifteen states do not provide lawyers for indigent felony defendants,[5] and the Due Process Clause is not violated unless defendants can show special circumstances that require appointment of counsel.[6] The result in most cases is a charade of a process where the defendant has no expert legal advice. Moreover, prosecutors have no duty to turn over exculpatory evidence to the defense. Earl Warren would have concluded that the Due Process Clause, as the Court had interpreted it, permitted states to impose the worst of all worlds on defendants—lay defendants, who might be innocent, forced to defend alone against experienced prosecutors aided with evidence obtained by questionable police methods.

Warren might have asked himself: Can we remedy those problems and bring the recalcitrant states in line? They tried.

But largely failed, I will argue. The Warren Court solutions were doomed to failure, not because of Richard Nixon and his Court appointments, but because of two flawed assumptions. First was the Court's understanding of human nature. Partaking of Kennedy's optimism, the Warren Court thought that if it led, state police, prosecutors, legislatures, and courts would follow even when they would have preferred not to follow. It was not to be.

A related failure was the lack of understanding that criminal justice systems are self-adjusting and tend toward crime control; take away one method of efficiently solving and prosecuting crimes, and the system finds another way.

I wish to be clear. I am not saying the Warren Court made a mistake in deciding its landmark criminal procedure cases. They stand as an enduring testament to the American commitment to fairness, equality, and compassion. They probably, at the margin, improved the lot of those who suffered the heavy burdens of our 1950s state criminal justice systems. My claim is more modest: The criminal procedure "revolution" was more revolutionary in what it promised than in what it delivered. The "system" adjusted to the "revolution" in various ways, some obvious—the

2. 347 U.S. 483 (1954).
3. 338 U.S. 25 (1949).
4. *See, e.g.*, Crooker v. California, 357 U.S. 433 (1958).
5. McNeal v. Culver, 365 U.S. 109, 120 (1961) (appendix to opinion of Douglas, J., concurring).
6. *See* Betts v. Brady, 316 U.S. 455 (1942).

refusal of most state legislatures to provide adequate funding for indigent defense[7]—and some not so obvious—the creation of more and more draconian criminal penalties.[8] And, a President Humphrey would not, in my judgment, have made a difference in the long run. Both of the Warren Court's failed assumptions would have played out the same way.

I. THE FOURTH AMENDMENT REMEDY TRAP

The Court noted probable jurisdiction to hear an appeal from the state court in *Mapp v. Ohio* in the fall of 1960,[9] weeks before Kennedy was elected. The case was briefed and argued, principally on the ground that the First Amendment protects possession of obscenity in one's home.[10] After the conference on the case, five justices decided to make it a vehicle to overrule *Wolf* and force the states to apply the exclusionary rule.[11] Conventional wisdom is that the Court switched theories because it was the perfect case to overrule *Wolf*. The Court would not be letting a rapist or murderer go free but merely someone who possessed mildly pornographic material.[12]

Yes of course, but that begs the question of *why* the Court thought it advisable to overrule *Wolf* a mere twelve years after it was decided by a 6-3 vote. That, I submit, is perhaps best explained as the first shot out of the cannon designed to "undo the heavy burdens" placed on defendants in states that did not apply the exclusionary rule. Whether the Court would have reached out to overrule *Wolf* if Kennedy had not won the presidency, or merely decided the First Amendment issue it would decide later in *Stanley v. Georgia*,[13] is of course unknowable.

Following *Wolf*, some police took flagrant advantage of the "open door" to admission in states that did not utilize the exclusionary rule. In *Rochin v. California*, three deputy sheriffs broke into Rochin's bedroom without a warrant or consent.[14] When he tried to swallow some capsules he grabbed from his bedside table, three officers "jumped upon him" and attempted to extract the capsules from his mouth.[15] When they failed to keep Rochin from swallowing the capsules, the officers handcuffed him and took him to a hospital where his stomach was

7. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045–46 (2006); Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 77 WASH. & LEE L. REV. 883, 924 (2013).

8. *See* William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997).

9. *See* Mapp v. Ohio, 364 U.S. 868 (1960) (issuing its opinion on October 24).

10. *See id.* at 673 n.4 (Harlan, J., dissenting).

11. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1367–68 (1983).

12. *Id.* at 1367.

13. 394 U.S. 557 (1969) (holding that the First Amendment protects the private possession of obscenity).

14. 342 U.S. 165, 166–67 (1952).

15. *Id.*

"pumped," and he was forced to vomit.[16] The vomit contained residue of morphine. He was convicted of possession of morphine and sentenced to sixty days.[17]

When Rochin reached the Supreme Court in 1952, the Court found itself in an uncomfortable position. The conduct of the state officers was offensive. But, would the Court overrule *Wolf* only three years after it was decided? That was surely unappetizing. So, in an opinion by Justice Frankfurter, who wrote *Wolf*, the Court turned to a pure due process analysis. Due process of law includes not treating suspects the way the officers treated Rochin. The methods of the deputy sheriffs were "too close to the rack and the screw" to be permissible.[18] And what standard would courts apply to determine when police violated due process? They would look to see whether the state conduct "shocks the conscience."[19]

The *Rochin* solution suffered two major problems. First, one hopes modern police search and seizure techniques rarely approach the rack and the screw, meaning that the protection offered by *Rochin* was much more limited than the Fourth Amendment requirement that searches and seizures be reasonable. Second, "shock the conscience" has no readily understood definition. Of course, "unreasonable searches and seizures" suffers a similar problem with indeterminacy, but the Court is stuck with the constitutional text; it does not have to offer standards or norms that are also maddeningly vague.

The indeterminacy problem with "shock the conscience" manifested itself a mere two years after *Rochin*, once again surfacing in a California case. How would the physical mistreatment of the suspect in *Rochin* compare to police putting a microphone in the bedroom occupied by husband and wife and monitoring the microphone for months? Police in *Irvine v. California*[20] were treated to an audio recording of everything that was said and done in that bedroom for months. Shock your conscience? Not that of Justice Jackson, who wrote the plurality opinion in *Irvine*. "However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping."[21] Justice Frankfurter, the author of *Rochin*, dissented. His conscience, along with that of Justice Burton, was shocked. "Surely the Court does not propose to announce a new absolute, namely, that even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials."[22]

Justice Clark, concurring in the judgment in *Irvine*, put his finger on the problem with the *Rochin* approach: It "makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by

16. *Id.* at 166.
17. *Id.*
18. *Id.* at 172.
19. *Id.*
20. 347 U.S. 128 (1954).
21. *Id.* at 133.
22. *Id.* at 146 (Frankfurter, J., dissenting).

guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution."[23] He also pointed the Warren Court's way out of the mess—to revisit the decision in *Wolf* not to require states to apply the exclusionary rule: "Perhaps strict adherence to the tenor of that [*Wolf*] decision may produce needed converts for its extinction."[24] This explains why Clark concurred in the judgment; he wanted to hold the Court's feet to the *Wolf* fire.

And nine years later, *Wolf* was indeed extinguished in an opinion by Justice Clark. In *Mapp v. Ohio*,[25] Clark had the bare minimum of votes he needed to overrule *Wolf* and make *Rochin* largely irrelevant.[26] The tenor of the *Mapp* opinion was that the Court had finally solved the indeterminacy problem of *Wolf-Rochin-Irvine*.

> Today we once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic [Fourth Amendment] right, reserved to all persons as a specific guarantee against that very same unlawful conduct.[27]

Case closed. State and federal courts would apply the exclusionary rule. Did the police violate the Fourth Amendment when conducting a search for and seizure of item X? If so, X is inadmissible in state or federal court.

Of course, suppressing X is an easy judicial chore when, as in *Mapp*, X consists of four mildly pornographic books and a hand-drawn obscene picture.[28] It is a much more unpleasant task when the challenged evidence proves a murder, a rape, or an armed robbery. 1960s idealism might have suggested courts would follow the Court's lead and apply the exclusion remedy without "peeking" through to see what kind of crime is being prosecuted. But, that was not to be the case.

The discretion that *Wolf* left state courts as to remedy, and that *Mapp* removed, quickly resurfaced when courts considered what is a reasonable search and seizure and what exceptions it should make to the exclusion remedy. As to exceptions to exclusion, a defendant convicted of a brutal murder asked the courts to reverse his conviction on the ground that the police officer used the wrong search warrant

23. *Id.* at 138 (Clark, J., concurring in judgment).

24. *Id.* at 139.

25. 367 U.S. 643 (1961).

26. *Rochin* still applies in situations where the Fourth Amendment is not violated. In Hernandez v. State, 548 S.W.2d 904 (Tex. Ct. Crim. App. 1977), for example, the police could rely on an exigent circumstance exception to the Fourth Amendment, but *Rochin* was nonetheless available to argue for exclusion.

27. *Id.* at 655–56.

28. Stewart, *supra* note 11, at 1367.

form.[29] Because of the form error, the warrant authorized a search for controlled substances but not for evidence of a murder. The Massachusetts Supreme Judicial Court held that the search of the defendant's home could not be authorized by the warrant, and therefore the evidence of the murder had to be suppressed. The murder conviction was reversed. The United States Supreme Court declined to follow the state court, instead applying its newly-created good-faith exception to the exclusionary rule.[30] Letting Ms. Mapp walk free is a very different judicial chore than letting a murderer walk. A murder defendant's conviction stood despite the Fourth Amendment violation. The Court now recognizes good faith exceptions to the exclusionary rule for searches based on a search warrant even though the officer violated the requirement of "knock and announce";[31] for arrests based on a statute later held unconstitutional;[32] for arrests based on a doctrine later overruled;[33] for arrests on insufficient cause if there was an arrest warrant outstanding even though the officer did not know about the warrant;[34] for arrests based on a warrant that a judicial employee mistakenly told the officer was outstanding;[35] and for arrests based on a warrant that a police employee mistakenly told the officer was outstanding.[36] Plenty of good faith to go around and lots of evidence introduced!

James Spiotto's 1973 study contains empirical evidence suggesting that judges "bend" the Fourth Amendment in cases of serious crimes.[37] Spiotto found that, in cases of violent, serious felonies, Chicago judges granted 8% of motions to suppress while 82% were successful in narcotics and gambling cases.[38] To be sure, there are confounding variables. Police are surely more careful to obey the Fourth Amendment in murder, rape, and robbery cases because the consequence of losing evidence is more serious. And, evidence is usually harder to obtain in drug cases, leading police to take more Fourth Amendment risks in these, typically minor, cases. Still, a difference as stark as the one Spiotto found suggests that courts will "bend" the Fourth Amendment to permit a search for truth when a dangerous criminal might otherwise go free. And Spiotto's study was before the Court created the various good-faith exceptions to exclusion. Courts now have more tools to

29. Massachusetts v. Sheppard, 468 U.S. 981, 987 (1984); *accord* United States v. Leon, 468 U.S. 897 (1984).

30. *See Leon*, 468 U.S. at 897.

31. Hudson v. Michigan, 547 U.S. 586 (2006); Utah v. Strieff, 579 U.S. ___ (2016) (describing the doctrine as "attenuation of the taint" of the unlawful entry).

32. Illinois v. Krull, 480 U.S. 340 (1987).

33. Davis v. United States, 564 U.S. 229 (2011).

34. *Strieff*, 579 U.S. (describing the doctrine as "attenuation of the taint" of the unlawful arrest).

35. Arizona v. Evans, 514 U.S. 1 (1995).

36. Herring v. United States, 555 U.S. 135 (2009).

37. James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973).

38. In murder, rape, and robbery cases, a total of 49 motions to suppress were made; only 4 were successful, a rate of 8%. In narcotics and gambling cases, 1,149 motions to suppress were made; 941 were successful, a success rate of 82%. *See id.* at 250, tbl. 2.

permit them to avoid exclusion.

Consider the seven years and three trials it took to send Robert Reldan to prison for life.[39] Within a period of ten days in October 1975, two young New Jersey women disappeared.[40] Their naked bodies were found thirteen miles apart later that month. State police and the FBI had reason to suspect Reldan, a sex offender recently paroled from prison.[41] After Reldan came to authorities' attention as a suspect in the murders, they developed probable cause to believe he had broken into two houses and stolen property, fleeing the scene in a particular automobile.

Police arrested Reldan for the break-ins and impounded his car. They got a search warrant to search the car for evidence of the break-ins, "including, but not limited to, fingerprints, implements used to commit the break and entries, stolen property listed on the attached sheet and anything else of evidentiary value that a complete and thorough search might disclose." The attached sheet "listed numerous items of jewelry and other personal property."[42] The FBI assisted with the execution of the warrant, which included vacuuming the car's interior. Hairs and other minute particles seized from the car were examined microscopically by the FBI, producing forensic evidence used to link Reldan to the murders.

Prior to his first trial for the two murders, Reldan made a Fourth Amendment motion to suppress the forensic evidence on the ground that vacuuming the car and examining the contents with microscopes exceeded the scope of a warrant ostensibly designed to permit a search for evidence of break-ins.[43] The trial judge agreed and ordered the evidence suppressed; the State did not appeal that ruling.[44] Without forensic evidence, the State's case was, evidently, not terribly strong, and the jury could not reach a verdict.[45] For the second trial, the State improved its case by introducing evidence that Reldan had prior convictions for similar crimes against women who survived the attacks. The judge admitted the other crimes evidence to show identity and not as evidence that Reldan committed the murders. The judge gave a limiting instruction to the jury, but the jury convicted. It is difficult to disagree with the appellate court that admission of the other crimes evidence was highly prejudicial: "The intrusion of the evidence of these prior crimes into this trial clearly had the high potential for prejudice recognized in our cases . . . ."[46] The appellate court reversed Reldan's murder convictions.

One sees the State's predicament. The prosecution could not win at trial number one without the prior crimes evidence and now it cannot introduce that evidence at trial number three. The State obviously believed Reldan was the

39. *See* State v. Reldan, 495 A.2d. 76 (N.J. 1985); State v. Reldan, 449 A.2d. 1317 (N.J. Super. Ct. App. Div. 1982).

40. *Reldan*, 495 A.2d at 79.

41. *Id.*

42. *Id.* at 80.

43. *Id.*

44. *Id.* at 85.

45. *Id.* at 78.

46. State v. Reldan, 449 A.2d. 1317, 1323 (N.J. Super. Ct. App. Div. 1982).

murderer, meaning that the prosecution had to find a third way. And it did. "In anticipation of the third trial, the State moved before the trial court for a reconsideration of the May 1979 suppression order."[47] The trial court agreed "that a new hearing on the suppression issue was warranted." One wonders why. The "law of the case" should have foreclosed reconsideration of a motion that the State lost and did not appeal. The trial court once again suppressed the evidence "because 'the execution of the warrant went beyond its scope' and there were no exigent circumstances justifying a warrantless search."[48] The State appealed the trial court's ruling on an interlocutory basis.

The New Jersey Supreme Court reversed the trial court and held that the Fourth Amendment permitted use of the forensic evidence at trial number three. The court held the search was within the scope of the warrant on the somewhat tenuous ground that a microscopic search might uncover "soil particles, debris, paint chips and the like" related to the break-in.[49] But how does a warrant that does not mention those items satisfy the Fourth Amendment requirement that a warrant must "particular[] describing the place to be searched, and the persons or things to be seized"?[50]

No, the real reason the majority allowed the prosecution to introduce the forensic evidence becomes plain in the part of the opinion rejecting the defendant's "law of the case" argument. The underlying "law of the case" principle, as described by Justice Holmes, is the "practice of courts generally to refuse to reopen what has been decided" in a particular case.[51] But as the state court concluded, a court can refuse to apply the "law of the case" principle by showing that deciding the issue differently would on balance produce more good than harm. The state supreme court tipped its hand when it noted that "a great deal could be lost in terms of the search for truth through the suppression of otherwise reliable evidence if reconsideration [of the suppression issue] were to be foreclosed" in Reldan's case.[52] Translated: the State needs this evidence to convict a murderer. And in trial number three he was convicted and sentenced to life for one murder, and thirty years for the other.[53]

Even with the powerful hydraulic of not freeing a murderer operating in the State's favor, two justices dissented. Justice O'Hern began the dissent this way:

> In the circumstances of this case, after six years and two trials, we should not reverse a pretrial ruling on the admissibility of evidence. I recognize that the law of the case doctrine is not an

47. *Reldan*, 495 A.2d at 79.

48. *Id.*

49. *Id.* at 81.

50. U.S. CONST. amend. IV.

51. Messinger v. Anderson, 225 U.S. 436, 444 (1912).

52. *Reldan*, 495 A.2d at 87.

53. Telephone conversation with Criminal Court Clerk, Bergen County, N.J. (Sept. 21, 2003) (on file with *The University of the Pacific Law Review*).

> inexorable mandate to such a conclusion. Still I believe, as does the majority, that the doctrine expresses public policy concerns that should guide a court's discretion. We differ on the application of those policies to the case.[54]

In almost every case involving a Fourth Amendment violation, admitting physical evidence seized from the defendant would serve the truth. Prior to *Mapp*, states could promote the search for truth by not applying the Fourth Amendment exclusionary rule. After *Mapp*, that was no longer a choice. But has all that much changed? If evidence is needed to convict a murderer, a court can simply interpret the Fourth Amendment so that it is not violated or find an exception, such as the officer's good faith. Discretion has shifted from rules affecting all cases to discretion in individual cases, but discretion remains.

Of course, the principal purpose of the Fourth Amendment and its handmaiden, the exclusionary rule, is to deter police from running roughshod over those suspected of crime. We have no idea how well that works, but there are reasons to be skeptical even if we assume police behave in ways that reduce the likelihood of exclusion. *Mapp* told us it was closing the only door remaining open to evidence seized by lawless official conduct. Really? Imagine you are a state trooper, it is late at night, and you pull a car over for speeding. The driver and passengers are young men who appear nervous and you decide to "fish" for evidence of crime. If there is a problem with license and registration, you might be able to impound the car. An inventory of the trunk will dutifully record the recently-fired handgun that had just killed someone. It will be admissible at trial.

If there are no grounds for impoundment, you can try for consent. "You don't mind if I look around in your car" might work even if the driver/owner knows about the gun. We might have to litigate whether "look around in your car" includes the trunk, but in a murder case I have little doubt that the State wins that question. If that fails, a few questions (what are you doing out so late at night) might trigger a response that creates probable cause. The driver might say they were returning from a concert at the same time one passenger said they had been working late. Probable cause? In a murder case where the State does not have a confession, it just might be. And, of course, police can always lie about consent: The officer searches the trunk; if he finds nothing, he lets the car go on its way; if he finds the handgun, he later testifies that the driver consented.

If inventory and consent fail, and you decide not to lie, you let the car go. You cannot catch all the fish in the lake, but you can catch your limit by the strategies outlined above. Is any of this surprising? It should not be as long as you remember the first word in "criminal justice system." When that criminal is a murderer, the Spiotto study suggests the door to evidence is open quite wide.

Now of course it might be that the justices in the *Mapp* majority were aware

54. *Reldan*, 495 A.2d at 87 (O'Hern, dissenting).

of the vast discretion that judges have in Fourth Amendment cases—what exactly is an unreasonable search and seizure? But, the language in the opinion suggests the Court thought it was providing defendants a reasonably clear-cut rule. The Court noted that it "has not hesitated to enforce as strictly against the States as it does against the Federal Government" the other rights in the Bill of Rights, and it intended to enforce the Fourth Amendment the same way.[55] The Court said that it had "required of federal law officers a strict adherence to [the Fourth Amendment and its exclusionary rule] which this Court has held to be a clear, specific and constitutionally required" remedy.[56] And the Court now required the same of state officers. As noted earlier, the Court said it was closing "the only courtroom door remaining open to evidence secured by official lawlessness."[57]

Moreover, at the time *Mapp* was decided, the Court's federal search and seizure cases presented a relatively clear-cut set of doctrines. Since 1961, the Fourth Amendment doctrine has become more complex, with more doctrines and exceptions. Though I cannot prove cause and effect, one potential explanation for the current mess of doctrines and exceptions is the reluctance to suppress reliable evidence of guilt.

The Court's idealism was assuming that police, prosecutors, and judges would approach each Fourth Amendment issue as if it were dis-embodied from the crime being prosecuted. As James Spiotto observed, what counts as a Fourth Amendment violation in a minor drug possession case just might not be a Fourth Amendment violation in a murder case.

Are we to assume that police and prosecutors were ten times more careful in those serious, violent crime cases? You are free to do so. I prefer to think that there is sufficient play in the Fourth Amendment joints to permit judges to admit evidence in most cases if the crime is serious enough.

Is that a bad development? I'm not sure. But I am relatively sure it is not a development the Warren Court anticipated.

II. THE RIGHT TO COUNSEL MIRAGE

By 1962, when Arthur Goldberg took the seat of Felix Frankfurter, the Warren Court had a solid core of reformers. In addition to Warren and Goldberg, Justices Douglas, Brennan, and either Black or Clark, sometimes both, could be counted on to seek to expand due process protections for state suspects and defendants. Justice Goldberg only served three years but was replaced by the equally reform-minded Abe Fortas.[58] The reformers must have been particularly aghast when they contemplated the fifteen states that did not make a routine appointment of counsel

55. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

56. *Id.* at 648.

57. *Id.* at 654–55.

58. Justice Black and Justice Fortas supplied the critical votes to create the narrow five justice majority in Miranda v. Arizona, 384 U.S. 436 (1966). Justice Clark dissented in three of the four *Miranda* cases.

to indigent felony defendants. It is difficult today to believe that *Betts v. Brady* held in 1942 that the Due Process Clause permitted a State to deny counsel to an indigent tried for robbery.[59]

As Justice Black said for the Court when overruling *Betts* in *Gideon v. Wainwright*, one of the first major reform cases, "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[60] There were no dissents.[61] The only puzzle is why it took until 1963 to read due process to include the right to counsel for indigents in felony cases. Indeed, Justice Douglas in a concurring opinion in 1961 had it right: "I cannot believe that a majority of the present Court would agree to *Betts v. Brady* were it here de novo . . . ."[62]

Problem solved, right? Uh, no. The solution was not as simple as the *Gideon* Court seemed to think. The Court, of course, cannot order funding for any right that it creates. The right to counsel would later expand to include any offense for which a defendant serves even a day in jail.[63] How would governments provide free lawyers to every defendant who faced a realistic prospect of jail time? The answer: Not very well.

A horrendous example of a failing public defender system is the crisis in Louisiana. In Vermilion Parish, Louisiana, a public defender office of ten lawyers was, in March 2016, reduced to a single lawyer, Natasha George. [64] Ms. George handed out applications for defense representation, telling the indigent defendants they would be put on a wait list that is "over 2,300 names long and growing."[65] For those denied bail, the waiting would be done in jail. In the words of Jay Dixon, the chief executive of the Louisiana Public Defender Board, "We have essentially been managing a financial collapse."[66]

Here is the noble idea that *Gideon* expressed:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before

59. 316 U.S. 455, 473 (1942).

60. 372 U.S. 335, 344 (1963).

61. *Id.* at 336. Justice Clark concurred in the judgment, *id.* at 347, though why he did not join Justice Black's opinion for the Court is not made clear in his opinion.

62. McNeal v. Culver, 365 U.S. 109, 117 (1961) (Douglas, J., concurring).

63. *See* Scott v. Illinois, 440 U.S. 357 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972).

64. Campbell Robertson, *In Louisiana, the Poor Lack Legal Defense*, N.Y. TIMES (Mar. 16, 2016), htttps://www.nytimes.com/2016/03/20/us/in-louisiana-the-poor-lack-legal-defense.html?ref=todayspaper (on file with *The University of the Pacific Law Review*).

65. *Id.*

66. *Id.*

> impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[67]

And here is the reality. Mary Sue Backus and Paul Marcus, reporters for the National Committee on the Right to Counsel, concluded that indigent defense in 2009 faced a national crisis: "By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced."[68] The underfinancing leads to ineffective assistance of counsel, "excessive public defender caseloads and insufficient salaries and compensation for defense lawyers."[69] Or as Donald Dripps puts it with his characteristic pithiness: "indigent defense is constitutionally required, but only in anemic form."[70]

Part of the Warren Court's idealism that underlies and undermines the right to counsel for indigent defendants is the assumption that legislatures would care what nine justices said about the need to provide the guiding hand of counsel for indigent defendants, most of whom are factually guilty. The very fact that fifteen states did not provide indigent felony defendants with counsel prior to *Gideon* should have been a cautionary tale to the reformers who expected *Gideon* to deliver equal justice.

The standard liberal critique of *Gideon*'s implementation is that it is all about money. More money will solve the problem. But this misses the most fundamental Warren Court idealism. The *Gideon* Court assumed that by pressing one lever or two levers, the rest of the criminal justice "machine" remains static. William Stuntz articulates the classic critique of this separation into airtight categories:

> Most talk about the law of criminal procedure treats that law as a self-contained universe. The picture looks something like this: The Supreme Court says that suspects and defendants have a right to be free from certain types of police or prosecutorial behavior. Police and prosecutors, for the most part, then do as they're told. When they don't, and when the misconduct is tied to criminal convictions, the courts reverse the convictions, thereby sending a message to misbehaving officials. Within the bounds of this picture there is room for a lot of debate . . . . But for all their variety, these debates take for granted the same basic picture of

67. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

68. Backus & Marcus, *supra* note 7, at 1045.

69. *Id.* at 1045–46; *see also* NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf (on file with *The University of the Pacific Law Review*).

70. Dripps, *supra* note 7, at 924.

> the process, a process whose only variables are the rules themselves and the remedies for their violation.
>
> The picture is, of course, wrong. Criminal procedure's rules and remedies are embedded in a larger system, a system that can adjust to those rules in ways other than obeying them.[71]

Thus, as Dripps has argued, as long as the system permits long sentences, multiple overlapping criminal offenses, and no control over plea bargaining, prosecutors can achieve the punishment they want almost without regard to the quality of defense counsel.[72] In his words: "improving indigent defense without reining in sentence severity and prosecutorial discretion would do little good. It might even do harm if prosecutors respond to the heightened risks of losing trials by increasing the trial penalty."[73]

A classic example is *Bordenkircher v. Hayes*,[74] a thoroughly shameful case. The State charged Paul Hayes with uttering a forged instrument in the amount of $88.30. The prosecutor offered a plea deal of five years and told Hayes and his lawyer that if he did not accept the deal, the prosecutor would refile charges under the state's Habitual Criminal Act with its mandatory life sentence.[75] The habitual offender act applied to Hayes based on two prior convictions that netted him five years in the juvenile reformatory and five years on probation.[76] In sum, the prosecutor threatened a defendant who had never served a day in adult prison with a life sentence for a crime worth $88.30 if he did not accept the plea deal of five years. Hayes claimed to be innocent of the forged instrument charge and, presumably with counsel from his lawyer, refused the plea deal. The prosecutor carried through on his threat, and Hayes was convicted of the third felony and sentenced to life in prison.

The Court held, 5-4, that nothing in the Due Process Clause forbade the prosecutor from threatening to up the ante to life in prison if Hayes did not accept the plea deal. A juvenile offense, an adult felony for which he received probation, and uttering a forged instrument in the amount of $88.30 resulted in Paul Hayes getting a life sentence. The greatest lawyer in history, Cicero himself, could do nothing to prevent the prosecutor from making this threat and could do nothing to defend his client if Hayes refused to take the five-year deal. The combination of no oversight of plea bargaining and a draconian sentencing structure (repealed not long after Hayes was sentenced)[77] made the right to counsel essentially

71. Stuntz, *supra* note 8, at 3.

72. Dripps, *supra* note 7, at 924.

73. *Id.* at 915.

74. 434 U.S. 357 (1978).

75. *Id.* at 358–59.

76. *Id.* at 359 n.3.

77. *Id.* at 358 (noting repeal in 1975). To add to Mr. Hayes's bad luck, he could not have been sentenced to life in prison under the revised Kentucky statute. Hayes v. Cowan, 547 F.2d 42, 42 n.1 (6th Cir. 1976).

meaningless.

The rest of the Paul Hayes story? He received parole after serving five years.[78] It seems the Kentucky parole board thought that the prosecutor's initial offer was the proper measure of punishment. It seems too harsh to me, but it is certainly fairer than life in prison.

Are indigent defendants in the fifteen states that did not provide counsel prior to *Gideon* better off today? The system looks fairer. A defense lawyer stands beside the defendant when he pleads guilty or (rarely) goes to trial. But is the plea, or the trial, really better for indigent defendants because a lawyer is present for the proceedings? Ask Paul Hayes. A true cynic would argue that, as a group, indigent defendants receive about the same level of punishment with defense counsel as they would receive if the prosecutor had no formal adversary. There is no way to test that proposition, but its very plausibility suggests that *Gideon* has largely been a failure.

III. THE CONFLICTED MINISTER OF JUSTICE

The Court announced *Gideon* on March 18, 1963. That day and the next, the Court heard argument in a case that, paired with *Gideon*, scholars once regarded as a superhero in the criminal procedure world.[79] It was *Brady v. Maryland*, announced two months after *Gideon*.[80] The *Brady* Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[81] Later cases would essentially discard the "upon request" part of *Brady*, creating what seems at first blush to be a broad right for defendants to be given favorable evidence in the hands of the prosecution.[82] It is not surprising that the Court granted certiorari in *Gideon* and *Brady* in the same term and decided them within two months of each other. Without *Gideon*, *Brady* would be largely pointless in the fifteen states that did not routinely provide counsel to indigent felony defendants. And without access to exculpatory evidence in the hands of the State, the right to counsel would not be an effective shield against an unfair or even wrongful conviction.

Brady appeared in 1963 to be an important protection against the conviction of innocent defendants. It was not to be. The reader has already realized that even

78. He was paroled on December 28, 1978. Letter from Kentucky Department of Corrections to author (Dec. 3, 2019) (on file with *The University of the Pacific Law Review*). Hayes was convicted of the habitual offender charge in April 1973. Brief for Petitioner at 3, Bordenkircher v. Hayes, 434 U.S. 357 (1978) (No. 76-1334), 1977 WL 189700 at *3. Assuming he began his sentence shortly thereafter, the sentence would have been roughly five years.

79. *See* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643 (2002).

80. 373 U.S. 83 (1963).

81. *Id.* at 87.

82. *See* United States v. Agurs, 427 U.S. 97, 101 (1976).

a robust discovery right is likely to be of little value if the case is one among hundreds of felony cases that a public defender has on her desk. But *Brady* turned out to be fragile in its own way. At the same time the Court was removing the "upon request" part of *Brady*, it was defining "material" in a way that made it easy for prosecutors to withhold evidence that was favorable but not clear proof of innocence. The Court has used multiple locutions for what defendants must show to demonstrate a *Brady* violation. One that is particularly difficult for defendants to meet on appeal is to show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[83] Translated: If the defendant cannot show a reasonable probability of an acquittal with the withheld evidence, the prosecutor did not violate the Due Process Clause.

As Scott Sundby has pointed out,[84] if *Brady* is limited to evidence that creates a reasonable probability of an acquittal, it might not affect many cases. Would ethical prosecutors routinely turn over evidence that creates a reasonable doubt about guilt and then proceed to trial? One hopes not. Of course, one can imagine a case where evidence in the hands of the prosecutor creates a reasonable doubt about guilt in the mind of the prosecutor but she believes that the case she will present at trial will prove guilt beyond a reasonable doubt even if she discloses the exculpatory evidence. Those cases are probably not very common.

However that question is resolved, the real problem is that the decision to turn over *Brady* material is in the hands of the prosecutor. Prosecutors in the American system are advocates. In European systems, prosecutors are trained separately and typically never practice law as an advocate.[85] Their duty is to help reach a just and accurate result. In the United States, of course, prosecutors are trained to be advocates in law school and then selected from the ranks of those who are successful advocates in practice.[86] It should not surprise that prosecutors continue to be advocates. Yes, they want to convict only the guilty, but as advocates, they want *to win convictions*. That means that prosecutors naturally view evidence favorable to defendants in the most pro-prosecution way possible. That is not a criticism of prosecutors; it is simply the way advocates think. And, once prosecutors view favorable evidence in the most pro-prosecution way possible, that reduces the universe of material that prosecutors must disclose to the defense. Dan Medwed explores this problem in *Prosecution Complex: America's Race to Convict and Its Impact on the Innocent.*[87]

Another problem with *Brady* is the black hole problem. When a prosecutor does not disclose arguably exculpatory evidence, most defendants will go to prison

83. Bagley v. United States, 473 U.S. 667, 682 (1985) (plurality).

84. Sundby, *supra* note 79, at 661.

85. I explore this difference between European and American prosecutors in George C. Thomas III, *Prosecutors: The Thin Last Line Protecting the Innocent*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed ed., 2017).

86. *See id.*

87. *Id.*

never knowing of a potential *Brady* violation. The evidence is, by definition, hidden. Perhaps a witness will come forward later, or an open records request will dislodge the exculpatory evidence, but one suspects that most defendants never learn of the failure to disclose. We really have no way to know the scope of the *Brady* problem. We do know that in a sample of cases from the National Registry of Exonerations, 13% of exonerations involve a *Brady* violation.[88] That means that in 13% of the convictions of innocent defendants, a court held that the defendant met the stringent standard of showing probable innocence, yet the prosecutors failed to disclose the evidence. But, we do not know how many undiscovered *Brady* claims are out there, like unexploded ordinance left over from a war.

Finally, even when a defendant discovers that prosecutors withheld potentially favorable evidence, and even if the Court crafted a less pro-prosecution standard for review on appeal, there is a hydraulic working against defendants. The only remedy is to vacate the conviction and start over; this time, by definition, the defendant will have a better shot at an acquittal or hung jury. To be sure, defendants who win *Brady* cases are presumably more likely to be innocent than the garden-variety defendant who pleads guilty, but courts are still loath to vacate a conviction of a probably guilty defendant.

The Warren Court idealism here is the assumption that prosecutors can put aside their training and decades of experience as an advocate-lawyer and suddenly become an unbiased minister of justice who looks at the State's case with skeptical eyes. Does that make sense even at a superficial level? The Warren Court idealism that undermines *Gideon* is subtle. But the idealism that sees prosecutors policing their files to turn over helpful evidence to defense lawyers so they can mount a better defense is almost grotesque.

A rational system of justice would have an examining magistrate overseeing the case and giving the defense what it needs. For example, a defendant in a homicide case claimed she was attacked in a motel room by a man with a knife and defended herself by turning his knife against him.[89] The prosecutor did not disclose the victim's conviction of carrying a deadly weapon and his conviction of assault and carrying a deadly weapon.[90] Are these convictions relevant to the defendant's claim of self-defense? You bet. Exculpatory? Yes, because they create an inference that she is telling the truth about him attacking her. Material under *Brady*? No, the Court held 7-2. The jury heard evidence that the victim was wearing a Bowie knife and had another knife in his pocket. His criminal record was thus "largely cumulative."[91] Really? It is one thing to carry a knife and another for the State to convict of carrying a deadly weapon; we do not know why the State charged him with carrying the deadly weapon, but he must have done something to call attention to himself. And even if that conviction is cumulative, how can a

88. *Id.* at 214.

89. United States v. Agurs, 427 U.S. 97, 101 (1976).

90. *Id.*

91. *Id.* at 114.

conviction of assault and carrying a deadly weapon be cumulative? It is one thing to carry a deadly weapon and another to assault someone while carrying a deadly weapon. I believe an impartial examining magistrate would disclose both convictions to the defense. Ask yourself why the prosecutor did not disclose the convictions. It was almost certainly his belief that if the defense could introduce those convictions, obtaining a conviction in the homicide case would be less likely. The Court never asked itself this rather obvious question.

One suspects the *Brady* Court realized that it was asking prosecutors to do the impossible. But here, as in *Gideon*, what choice did the Court have? The Court does not have the power to force 50 states to create the office of examining magistrate with a specific set of constitutionally-required duties. No, the *Brady* solution, like the *Gideon* solution, was all the Court could do. A cynic would say that both seminal Warren Court decisions make the pre-trial and trial process appear fairer without actually making them fairer.

IV. *MIRANDA*, *MIRANDA*, WHEREFORE ART THOU, *MIRANDA*?

So far, we have concluded that the Court's 1960s idealism has given defendants and suspects an exclusionary rule "solution" to Fourth Amendment violations that can be avoided in myriad ways. The Court's idealism has also given defendants a right to counsel that might not really change much in terms of the punishment delivered over the universe of indigent defendants, and a right to have the State disclose exculpatory evidence that probably does not actually produce much exculpatory evidence. What about our old friend, *Miranda v. Arizona*?[92] This one is trickier to assess because what the Court sought to achieve in *Miranda* is not easy to discern. One reading, perhaps the most persuasive one, is that the Court wished to empower suspects to resist police interrogation if that was their preference. Much of the language in the opinion supports this reading: "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[93]

The problem, as Seidman, Allen, and others have convincingly demonstrated,[94] is that at the moment the suspect opens his mouth and says something, his preference *was* to speak. What does it mean to empower a suspect to speak "freely"? Wigmore was correct a century ago when he claimed that the notion of an involuntary or unfree confession is incoherent: "As between the rack and a false confession, the latter would usually be considered the less disagreeable;

92. 384 U.S. 436 (1966).

93. *Id.* at 467.

94. *See, e.g.*, Ronald J. Allen, *Miranda's Hollow Core*, 100 NW. U. L. REV. 71 (2006); Louis Michael Seidman, *Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences*, 2 YALE J.L. & HUMAN. 149, 174 (1990); George C. Thomas III, *Miranda's Spider Web,* 97 B.U. L. REV. 1215 (2017).

but it is nonetheless voluntarily chosen"[95] All conscious choices are voluntarily made, even "your money or your life."

If the *Miranda* Court's goal was merely to tell the suspect he need not talk and can consult with a lawyer,[96] then we can conclude it has been enormously successful. The warnings seem sufficient to communicate those two ideas to almost all suspects:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[97]

Few suspects would fail to understand these warnings. To be sure, a suspect might forget the warnings if he endures a lengthy interrogation. But I have difficulty believing the suspect who begins to answer police questions does so without knowing, at least as an abstract matter, that he does not have to answer. If this is right, and if *Miranda*'s purpose was merely to convey information to the suspect, then we can conclude it has been quite a success.

But, the tenor of the Court's opinion suggests that its goal was something more than ensuring a bare, abstract level of knowledge that a suspect need not talk to police. Both civil libertarians and crime control advocates read the opinion more broadly. Much of the opinion speaks of police interrogation as a shady, if not downright illegitimate, enterprise. Three quotes will suffice to make the point (though I could produce a dozen or more).

> It is important [for police interrogators] to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights. . . .
>
> Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. . . .
>
> In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the

95. 2 JOHN HENRY WIGMORE, A TREATISE ON EVIDENCE, § 824 (2d ed. 1923).

96. *See* George C. Thomas III, *Separated at Birth But Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081 (2001).

97. *Miranda*, 384 U.S. at 479.

evils it can bring.[98]

These broadsides against police interrogators suggest the Court sought to re-order a suspect's preferences so he would not *want* to talk to police. That reading is the one the *Miranda* dissents embraced. As Justice White put it in his dissent:

> The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself.[99]

But one might respond, as Justice White responded: why would *that* be an illegitimate goal? Why would the Court want to discourage guilty suspect from confessing? In White's words:

> I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent.[100]

Justice Harlan made the same point in his dissent: "Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law."[101]

If the Court's goal in *Miranda* was to reorder preferences to make suspects more resistant to police interrogators, then it has been an abject failure. Though my friend Paul Cassell has argued for decades that *Miranda* has suppressed the rate at which police obtain confessions,[102] the effect is at the margin, if it exists at

98. *Id.* at 455–56.

99. *Id.* at 538–39 (White, J., dissenting).

100. *Id.* at 539.

101. *Id.* at 517 (Harlan, J., dissenting).

102. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 50 (1998); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L REV. 90 (1996); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996).

all. Roughly 80% of suspects waive *Miranda* and talk (freely?) to police.[103] While we do not know for sure how many suspects refused to talk to police prior to *Miranda*, it was roughly in the 20% range.[104] So *Miranda* has, perhaps, stiffened the resolve, reordered the preferences, of a percent or two or three of suspects.

And it is entirely possible (though Cassell does not see the world this way) that *Miranda* actually facilitates police efforts to get suspects to incriminate themselves. If the suspect expects the third degree, he might be inclined to say nothing, as suspects often did in the "bad old days" of the third degree. But today we have a friendly cop who tells you that you need not talk to him but, by the way, this is your last and best chance to tell your side of the story. Of course, police probably always stressed that suspects should tell their side of the story but the strategy is likely more effective after hearing the soothing warnings.

Though the analogy is far from perfect, consider the interrogations of al-Qaeda detainees after 9/11. Special agent Ali Soufan claims that the use of nonthreatening techniques can confuse detainees and lead them to cooperate. "[E]ngaging and outwitting" detainees often proves more productive than coercion.[105] "Cruel interrogation techniques not only serve to reinforce what a terrorist has been prepared to expect if captured; they give him a greater sense of control and predictability about his experience, and strengthen his resistance."[106] Soufan claims that he was quite successful in using these nonthreatening techniques in the wake of 9/11, but when the CIA began outsourcing interrogations to operatives who applied increasing levels of coercion (like waterboarding), the level of cooperation declined.

Consider the interrogation of a murder suspect in *Berghuis v. Thompkins*.[107] Detective Helgert gave the suspect *Miranda* warnings and had him read the fifth warning aloud: "You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."[108] This is not part of the warnings the *Miranda* Court required but it strikes me as a good idea. Thompkins thus knew that he controlled whether and when to answer questions.

> About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with

103. *See* Cassell & Hayman, *supra* note 102, at 839; Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 282–83 (1996); George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959 (2004).

104. *See* George C. Thomas III, *Is Miranda A Real-World Failure: A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996).

105. ALI H. SOUFAN, THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA 423 (2011).

106. *Id.*

107. 560 U.S. 370 (2010).

108. *Id.* at 375.

> tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.[109]

Though obviously I cannot prove it, I believe that had Helgert applied the third degree to Thompkins, without giving him *Miranda* warnings, Thompkins would not have responded to the questions about God. If that is right, *Miranda* laid the groundwork for the clever police interrogation strategy to succeed. Maybe *Miranda* is the clever police officer's friend.

V. REFORM GOING FORWARD

The problem the Court faced in the 1960s was not just its idealism but most fundamentally the lack of a mechanism for making meaningful reforms in the four areas we have discussed. At least on the right to counsel, Dripps is not as pessimistic as I am. He posits the possibility of a second revolution in the Court's criminal procedure that would require judicial supervision of plea bargaining where trial courts could "refuse[] to enter a plea absent a record of factual investigation and sound legal advice by counsel."[110] I do not see this happening in the lifetime of anyone reading this essay. Of course, as Dripps realizes, by itself this would be an insufficient solution to the counsel problem. As long as prosecutors can up the ante by charging multiple offenses that have long prison sentences, the defendant is not likely to benefit much from counsel. Thus, the second revolution would have to include reading the Eighth Amendment to drastically limit the power of legislatures to create draconian punishment schemes, and the Double Jeopardy Clause to forbid prosecutors to charge multiple offenses out of a single course of criminal conduct. This seems even less likely to me.

Dripps also posits the possibility of a legislative solution, recommending various reform proposals. The problem here is that it is a 50 state process. So far, some 25 years after it became clear that innocent defendants were being convicted,[111] no state has addressed that problem with a comprehensive revision of its criminal procedure designed to protect innocent suspects and defendants.[112]

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109. *Id.* at 376.

110. Dripps, *supra* note 7, at 918.

111. *See, e.g.*, Edward Connors, et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, NAT'L INST. OF JUST. (1996).

112. To be sure, there have been beneficial piece-meal revisions of state procedures in a handful of states. *See, e.g.*, State v. Henderson, 27 A.3d 872 (N.J. 2011) (eyewitness identifications); Robert P. Mosteller, *N.C. Inquiry Commission's First Decade: Impressive Successes and Lessons Learned*, 94 N.C. L. REV. 1725 (2016) (discussing several North Carolina reform ideas in addition to eyewitness identification); Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined By a Common Cause*, 52 DRAKE L. REV. 647, 654 (2003) (same).

Why start now?

One of my students suggested that Congress could force the needed legal machinery on all 50 states, either directly or by creating incentives for states to do so. The first problem, of course, is that Congress in modern times cannot agree on what day of the week it is, let alone pass meaningful legislation. But passing that problem, and assuming the miracle of a functioning Congress, I very much doubt the Constitution permits Congress to dictate to the states a code of criminal procedure. I see nothing in Article I, section 8 that could be stretched to justify forcing the states to follow a standard criminal procedure.[113]

Could it achieve the same goal by making federal criminal justice funding contingent on states adopting a reform-minded comprehensive criminal code? The problem here is two-fold. First, creating effective counsel requires reworking not only state criminal procedure but also the substantive criminal law. I doubt states receive enough federal criminal justice funding to persuade them to undertake that gargantuan task. Second, all four reforms (putting teeth into *Miranda* and the Fourth Amendment, and strengthening the role of counsel and right to exculpatory evidence) will result in fewer convictions. While some of these will be factually innocent defendants, many will be guilty. So ,Congress is going to tell all 50 states to completely rework their substantive criminal law and their criminal procedure to let more guilty defendants go free or lose X dollars in federal criminal justice funding? My bet is that almost all states will tell Congress to keep its criminal justice funding.

Even if we had a second criminal procedure revolution or a sudden willingness of states to change their criminal procedure and substantive criminal law, the Fourth Amendment problem seems insoluble to me. I thought about requiring search warrants for all searches except incident to arrest, but this depends on judges reading affidavits with care and rejecting warrants based on thin probable cause. Available evidence suggests this is another example of starry-eyed idealism.[114] The tort remedy appears to have worked well as a deterrent of over-zealous policing in colonial days and our first century as a nation. But that was because Americans in those times valued privacy and autonomy more than they feared crime. I do not believe that to be true today. Colonial juries came to the defense of printers and publishers, but would juries today really give murderers a tort judgment because the police used the wrong search warrant form? Color me extremely doubtful. So maybe there is no solution to the Fourth Amendment problem. Police will cut corners to solve serious crimes and courts will bend the rules in many cases to convict dangerous criminals. Maybe that is not a bad problem.[115]

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113. *See generally* U.S. CONST. art. I, § 8.

114. The National Center for State Courts reported in one city studied, the average length of magisterial review was a mere two minutes and forty-eight seconds; ten percent of the warrant applications were approved in less than one minute. RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 31 (1984).

115. To be sure, too much bending of the rules can lead to the conviction of the innocent, but the latest data suggest that the problem is less severe than many have believed. *See* George C. Thomas III, *Where Have All*

VI. CONCLUSION

We have examined four Warren Court attempts to reform the criminal process to give more power and control to suspects and defendants. And we have four more or less failures. What lesson should we learn from this experiment?

The first lesson is that the Warren Court, indulging its 1960s idealism, put far too much faith in the willingness of relevant actors in the criminal justice system to apply in a meaningful way the solutions the Court created. Could the Court have done more? If the Court in 1966, for example, thought police were tricking or cajoling too many incriminating statements from suspects, the answer was not *Miranda* warnings that, it turns out, were ineffective in stiffening the resolve of suspects to resist police interrogation. No, the solution was to hold that all statements made in response to police interrogation were compelled and inadmissible. Period.

There are two problems with that solution. First, the politics would have been ugly. It seems unlikely that Warren could have gotten four other votes for what would have amounted to the abolition of police interrogation. The reaction to *Miranda* in the country and the Congress was intensely hostile.[116] The reaction to abolition of interrogation would have been far worse. But the more fundamental problem is that abolition of police interrogation runs directly contrary to the 1960s liberal agenda that believed in empowering, not denying, choice. To take away a suspect's ability to cooperate with the police would have stood liberal ideology of the time on its head.

The Warren Court saw four severe problems with state criminal justice in the 1960s. The Court tried to fix the problems. It largely failed. Can we do better? Don't hold your breath.

And what of the *Brown v. Board of Education* revolution followed by the Civil Rights Act of 1964? Here is a small piece of discouraging data. In 1973, the Court ruled that federal courts could order desegregation remedies in schools outside the South if courts found that official actions had kept a substantial part of a school system racially segregated.[117] One potential court-ordered remedy was busing. There was much political opposition to forced busing, particularly in the Northeast.[118] Government data show that the percentage of African-American students in what it calls "intensely segregated minority schools" in the Northeast steadily *rose* from about 42% in 1973 to about 50% in 1991 and has stayed about the same since.[119] Even with the wind of *Brown* at their back, courts could not keep

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the Innocents Gone?, 60 ARIZ. L. REV. 865 (2018) (estimating rate of convictions of innocent defendants at 1/8% to 1/2%).

116. *See, e.g.*, LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 243–44 (1983); FRED P. GRAHAM, THE SELF-INFLICTED WOUND 158 (1970).

117. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

118. *See, e.g.*, MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION (2016).

119. Gary Orfield, et al., THE CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT

school segregation from growing worse in the Northeast.

Courts can, perhaps, help improve society at the margin. But, in the main, America will have the legal world it chooses through its legislatures. Justice Holmes,[120] Justice Brandeis,[121] Justice Frankfurter,[122] Justice Harlan,[123] and Justice Scalia,[124] to name five deep thinkers, would agree. Should we? Up to you.

AND AN UNCERTAIN FUTURE 12, fig. 3 (2014). To be sure, the percentage of African-American students in segregated schools declined in other parts of the country, particularly the South, but the trend peaked around 1990 and has been rising nationwide since. *Id.* And the states with the largest percentage of African-American students in racially segregated schools? Did you guess New York, Illinois, Maryland, Michigan, and New Jersey? *Id.* at 20, tbl. 9.

120. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (Holmes, J., dissenting on the ground that the Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States").

121. *See, e.g.*, New State Ice Co. v. Leibman, 285 U.S. 262, 311 (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

122. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949) (writing for the Court holding that it is up to each state to decide whether to require exclusion of evidence seized in an unreasonable search or seizure), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

123. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting) (noting that "[s]tates have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances").

124. Dickerson v. United States, 530 U.S. 438, 465 (2000) (Scalia, J., dissenting) (noting that the Court has no right to ignore "the will of the People's representatives in Congress" unless it finds that the Constitution demands a contrary result).